

Petroleum Nasional Bhd v Kerajaan Negeri Terengganu

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NOS W-01-62
OF 2002 AND W-01-65 OF 2002

MOHD NOOR AHMAD, RICHARD MALANJUM AND HASHIM YUSOFF
JJCA

29 AUGUST 2003

Civil Procedure — Disposal of action without trial — Disposal of case on point of law — Whether questions posed purely questions of law — Whether determination of threshold issues as preliminary issues would be decisive of whole litigation or main part of suit — Rules of the High Court 1980 O 14A

Contract — Construction of terms of contract — Intention of parties — Whether subsequent conduct can be used to interpret agreement

By a vesting instrument of 22 March 1975 ('the vesting instrument'), the State Government of Terengganu ('the plaintiff') vested Petroleum Nasional Bhd ('the first defendant') with the entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia. Under an agreement of the same date ('the principal agreement'), the first defendant agreed to pay to the plaintiff a sum equivalent to 5% of the value of petroleum won and saved in the State of Terengganu and sold by the first defendant. Payments were made by the first defendant from 1978 until March 2000, when the first defendant stopped the payment. The stoppage triggered the plaintiff to file this suit against the first defendant and the Government of Malaysia ('the second defendant'). The defendants, by separate applications, applied before the High Court, for certain proposed questions of law to be determined under O 14A and O 33 r 2 of the Rules of the High Court 1980 ('RHC'). The questions were, inter alia, whether: (a) the plaintiff had any right over petroleum in the continental shelf prior to the enactment of the Petroleum Development Act 1974 ('PDA') and the execution of the principal agreement ('the first question'); (b) the plaintiff vested any right to petroleum won and saved in the continental shelf of the coast of Terengganu in the first defendant pursuant to the vesting instrument and the principal agreement ('the second question'); and (c) the plaintiff was entitled to the payment as stipulated in the principal agreement ('the third question'). The learned High Court judge dismissed the applications. The defendants appealed.

Held, allowing the defendants' appeal with costs:

- (1) The primary issue in the suit was whether the plaintiff had, at any time, sovereign rights over petroleum in the continental shelf adjacent to the coast of Terengganu. This primary issue was contained in the first three questions posed in the defendants' applications. All the questions were purely questions of law. If the answer to the first question was in the plaintiff's favour, the answers to the second and third questions should also be in the plaintiff's favour. Hence, the answers would be decisive of the main or a substantive part of the suit. Therefore, what remained to be done was the determination of liability in damages and its assessment, if any, against the defendants since each of the defendants had made a

- A** concession not to contest the plaintiff's claim should the questions be answered in the plaintiff's favour. On the other hand, if the answer to the first question was against the plaintiff, the subsequent two questions would suffer the same fate and consequently, its action was doomed to fail because without the said right the plaintiff had nothing to vest in the first defendant and hence, would not be entitled to the payments under the principal agreement. Therefore, the determination of the threshold issues as preliminary issues would be decisive of the whole litigation or essentially the main part of the suit. This would result in a substantial saving of time and cost as it would significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper (see para 19).
- B**
- C** (2) As the first defendant had paid the plaintiff continuously for 22 years, the plaintiff's counsel contended that the subsequent conduct can be used to interpret the principal agreement. The first defendant's subsequent conduct was inadmissible to interpret the vesting instrument and the principal agreement, although it was admissible to show whether there was a contract and what the terms of the contract were, either originally or by variation, or as the basis for an estoppel (see paras 30–31); *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; and *Sussex Caravan Parks Ltd v Richardson (Valuation Officer)* [1961] 1 All ER 731 followed; *Watcham v AG of East Africa Protectorate* [1919] AC 533 not followed.
- D**
- E** (3) Where either O 14A or O 33 r 2 of the RHC applied, the reluctant party had no choice but to accept the risk, and the party was no longer entitled to the benefit of the ordinary process of law and the right to a trial. Hence, there was no distinction as to whether the party making the application for determination under O 14A and/or O 33 r 2 was the plaintiff or the defendants (see para 35).
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- G** (4) The High Court judge had merely considered the pleadings and the submissions of the parties and concluded that this case was far from being plain and simple because it raised a number of complex legal issues. The High Court judge did not identify and make proper appraisal of the material facts pleaded which were obviously undisputed or which should not have been disputed. Had he done so he would have been able to appreciate the facts and the magnitude of the case better and would have arrived at an appropriate conclusion and finding. His consideration on the matter was inadequate, incomplete and unsustainable. Hence, his exercise of discretion was incorrect. In any case, even if the case appeared to be or was complicated, it did not mean that the court must shun away from considering the applicability of O14A and O 33 r 2 of the RHC in relation to the questions of law which were clear and definite (see paras 39, 41).
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I [Bahasa Malaysia summary]

Melalui satu suratcara meletak hak pada 22 Mac 1975 ('suratcara meletak hak tersebut'), Kerajaan Negeri Terengganu ('plaintiff') telah meletak hak kepada

Petroleum Nasional Bhd ('defendan pertama') dengan keseluruhan pemunyaan dalam, dan hak-hak eksklusif, kuasa-kuasa, kebebasan-kebebasan dan perlindungan-perindungan memeriksa, mengeksploitasi, mendapat dan memperoleh petroleum sama ada di darat atau luar pesisir Malaysia. Di bawah perjanjian pada tarikh yang sama ('perjanjian utama'), defendan pertama bersetuju untuk membayar kepada plaintif sejumlah yang sama dengan 5% dari nilai petroliam yang didapati dan disimpan di Negeri Terengganu dan dijual oleh defendan pertama. Pembayaran telah dibuat oleh defendan pertama daripada tahun 1978 sehingga Mac 2000, apabila defendan pertama berhenti membuat pembayaran. Pemberhentian tersebut menyebabkan plaintif memfailkan guaman ini terhadap defendan pertama dan Kerajaan Malaysia ('defendan kedua'). Defendan-defendan, melalui permohonan berasingan, telah memohon di hadapan Mahkamah Tinggi, untuk persoalan-persoalan tertentu perundangan yang dicadangkan untuk ditentukan di bawah A 14A A 33 k 2 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Persoalan-persoalannya adalah, antara lain, sama ada: (a) plaintif mempunyai apa-apa hak ke atas petroliam di pelantar benua sebelum penggubalan Akta Kemajuan Petroliam 1974 ('AKP') dan penyempurnaan perjanjian utama ('persoalan pertama'); (b) plaintif terletak hak apa-apa hak ke atas petroliam yang didapati dan disimpan di pelantar benua di pesisir pantai Terengganu dalam defendan pertama menurut suratcara meletak hak dan perjanjian utama ('persoalan kedua'); dan (c) plaintif berhak terhadap pembayaran tersebut sebagaimana yang ditetapkan dalam perjanjian utama ('persoalan ketiga'). Hakim Mahkamah Tinggi yang bijaksana telah menolak permohonan-permohonan tersebut. Defendan-defendan telah merayu.

Diputuskan, membenarkan rayuan defendan-defendan dengan kos:

- (1) Persoalan utama dalam guaman tersebut adalah sama ada plaintif telah, pada bila-bila masa, memberikan hak-hak ke atas petroliam di pelantar benua bersempadan dengan pesisir pantai Terengganu. Persoalan utama ini terkandung dalam tiga persoalan pertama yang dikemukakan dalam permohonan-permohonan defendan-defendan. Kesemua persoalan merupakan persoalan perundangan semata-mata. Jika jawapan kepada persoalan pertama berpihak kepada plaintif, jawapan kepada persoalan kedua dan ketiga hendaklah juga berpihak kepada plaintif. Justeru itu, jawapan-jawapan tersebut adalah muktamad berdasarkan guaman utama atau sebahagian penting guaman tersebut. Oleh demikian, apa yang perlu dilakukan adalah penentuan liabiliti dalam ganti rugi dan penaksirannya, jika ada, terhadap defendan-defendan memandangkan setiap daripada defendan-defendan telah membuat satu konsesi untuk tidak mencabar tuntutan plaintif sekiranya persoalan-persoalan tersebut dijawab berpihak kepada plaintif. Sebaliknya, jika jawapan kepada persoalan pertama menentang plaintif, dua persoalan berikutnya akan mengalami nasib yang sama dan berikutnya, tindakannya akan gagal kerana tanpa hak tersebut plaintif tidak mempunyai apa-apa untuk diletakkan kepada defendan pertama dan justeru itu, tidak akan berhak terhadap bayaran di bawah perjanjian utama tersebut. Oleh itu, penentuan

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- A** terhadap persoalan-persoalan penting sebagai persoalan-persoalan utama adalah muktamad terhadap keseluruhan litigasi atau terutamanya bahagian utama guaman tersebut. Ini akan menjimatkan masa dan kos kerana ia dapat mengurangkan kos dan masa yang terlibat dalam persediaan pra perbicaraan atau berkaitan dengan perbicaraan yang sebenar (lihat perenggan 19).
- B** (2) Memandangkan defendan pertama telah membayar kepada plaintif selama 22 tahun, peguam plaintif berhujah bahawa perbuatan berikutnya boleh digunakan untuk menafsir perjanjian utama. Perbuatan berikut defendan pertama tidak boleh diterima menafsir suratcara meletakkan dan perjanjian utama tersebut, walaupun ia boleh diterima untuk menunjukkan sama ada terdapat satu kontrak dan apakah terma-terma kontrak tersebut adalah, sama ada asli atau diubah, atau sebagai asas untuk estoppel (lihat perenggan-perenggan 30–31); *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583; *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235; dan *Sussex Caravan Parks Ltd v Richardson (Valuation Officer)* [1961] 1 All ER 731 diikuti; *Watcham v AG of East Africa Protectorate* [1919] AC 533 tidak diikuti.
- C**
- D** (3) Di mana sama ada A 14A atau A 33 k 2 KMT telah dipakai, pihak yang berkeengganan tidak mempunyai pilihan tetapi untuk menerima risiko tersebut, dan pihak tersebut tidak lagi mempunyai hak untuk mendapat faedah proses perundangan yang biasa dan hak untuk satu perbicaraan. Justeru itu, tiada perbezaan tentang sama ada pihak yang membuat permohonan untuk ditentukan di bawah A 14A dan/atau A33 k 2 adalah plaintif atau defendan-defendan (lihat perenggan 35).
- E**
- F** (4) Hakim Mahkamah Tinggi hanya menimbang pliding-pliding dan hujah-hujah pihak-pihak dan membuat kesimpulan bahawa kes ini lebih daripada biasa dan mudah kerana ia menimbulkan beberapa persoalan perundangan yang kompleks. Hakim Mahkamah Tinggi tidak mengenalpasti dan membuat penilaian yang betul tentang fakta-fakta material yang diplidkan yang mana dengan jelas tidak dipertikaikan atau yang sepatutnya tidak dipertikaikan. Sekiranya beliau berbuat demikian beliau mungkin akan menghargai fakta-fakta dan pentingnya kes dengan lebih baik dan akan tiba kepada kesimpulan dan penemuan yang sesuai. Pertimbangan beliau berhubung perkara tersebut tidak memadai, tidak sempurna dan tidak boleh dikekalkan. Justeru itu, penggunaan budi bicara beliau adalah tidak betul. Dalam apa keadaanpun, walaupun kes tersebut kelihatan seperti atau adalah rumit, ia tidak bermaksud bahawa mahkamah perlu mengelak daripada menimbang pemakaian A 14A dan A 33 k 2 KMT berkaitan persoalan-persoalan perundangan yang adalah jelas dan nyata (lihat perenggan-perenggan 39, 41).]
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Notes

- I** For cases on disposal of action without trial, see 2(2) *Mallal's Digest* (4th Ed, 2001 Reissue) paras 2107–2112.
For cases on intention of parties, see 3(2) *Mallal's Digest* (4th Ed, 2003 Reissue) paras 2762–2776.

Cases referred to

- Ahmad Tajuddin bin Hj Ishak v Suruhanjaya Pelabuhan Pulau Pinang* [1997] 1 MLJ 241 (refd)
- Allen v Gulf Oil Refinery Ltd* [1981] AC 1001 (refd)
- Allen v Gulf Oil Refining Ltd* [1980] 1 QB 156 (refd)
- Ata Management Consultants Sdn Bhd v Makmuran Sdn Bhd* [1997] MLJU 446 (refd)
- Bank Negara Malaysia v Mohd Ismail* [1992] 1 MJL 400 (refd)
- Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282 (refd)
- Cow v Casey* [1949] 1 KB 474 (refd)
- E (a minor) v Dorset County Council; X & Ors (Minors) v Bedfordshire County Council* [1995] 2 AC 633 (refd)
- Egerton v Jones* [1939] 2 KB 702 (refd)
- Evans v Bartlam* [1937] AC 473 (refd)
- Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 (refd)
- Foo Loke Ying & Anor v Television-Broadcasts Ltd & Ors* [1985] 2 MLJ 35 (refd)
- Guna Sittampalam & Anor v Aik Hua Properties Sdn Bhd* [1989] 2 MLJ 162 (refd)
- Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191 (refd)
- Huang Ee Hoe & Ors v Tiong Thai King & Ors* [1991] 2 MLJ 51 (refd)
- ICS v West Bromwich BS* [1998] 1 All ER 98 (refd)
- James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 (folld)
- Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 (refd)
- Kamla Lal Hiranand v Harilela Padma Hari & Ors* [2000] 3 SLR 696 (folld)
- Keng Huat Film Co Sdn Bhd v Makhanlal (Properties) Pte Ltd* [1984] 1 MLJ 243 (refd)
- Korso Finance Establishment Anstalt v John Wedge* Court of Appeal (Eng) 15 February 1994 (unreported) (folld)
- L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 (folld)
- Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200 (refd)
- Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-Operative Housing Society Ltd* [2000] 2 MLJ 456 (folld)
- Microsoft Corporation & Ors v Summit Holdings Ltd & Anor and other appeals* [1999] 4 SLR 529 (folld)
- Muhammed bin Hassan v PP* [1998] 2 MLJ 273 (refd)
- Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (refd)
- New Zealand Insurance Co Ltd v Ong Choon Lin t/a Syarikat Federal Motor Trading* [1992] 1 MLJ 185 (refd)
- Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 (refd)
- Palaniappa Chettiar v Sithambaram Chettiar & Ors* [1982] 1 MLJ 186 (refd)
- Payna Chettiar, Re v Maimoon bte Ismail & Ors* [1997] 3 SLR 387 (folld)
- Pooley v Driver* (1877) 5 ChD 458 (refd)
- Prenn v Simmonds* [1971] 3 All ER 237 (refd)
- Ringtower Holding Plc, Re* (1989) BCC 82 (refd)
- SC Tavener & Co Ltd v Glamorgan County Council* (1941) 57 TLR 243 (refd)
- Si Rajah & Anor v Dato' Mak Hon Kam & 11 Ors (No 1)* [1994] 1 CLJ 207 (refd)
- Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324 (refd)
- Sussex Caravan Parks Ltd v Richardson (Valuation Officer)* [1961] 1 All ER 731 (folld)
- Tien Ik Sdn Bhd & Ors v Kuok Khoo Hwong Peter* [1992] 2 MLJ 689 (refd)

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- A** *Tilling v Whiteman* [1980] AC 1 (refd)
Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals
[1996] 1 MLJ 661 (refd)
Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors
[1995] 2 MLJ 709 (refd)
Watcham v Attorney-General of East Africa Protectorate [1919] AC 533 (not
B folld)

Legislation referred to

- Companies Act 1965
Continental Shelf Act 1966
C Convention on the Continental Shelf 1958
Convention on the Territorial Sea and Contiguous Zone 1958
Evidence Act 1950 ss 92 proviso (f), 95, 97, 98
Federal Constitution
Interpretation Act 1948 and 1967 s 17A
Petroleum Development Act 1974 ss 2(1), 4
D Rules of Court [Sing] O 14 r 12
Rules of the High Court 1980 O 14, O 14A r 3(b), O 18 rr 7(1), 11, 19, O 33 r 2
Rules of the Supreme Court [UK] O 14A
United Nations Convention on the Laws of the Sea (1982)

Appeal from: Civil Suit No S3–21–99 of 2001 (High Court, Kuala Lumpur)

- E** *Dato' Cecil Abraham (Rabindra S Nathan and Rishwant Singh with him)*
(Shearn Delamore & Co) for the first defendant.
Dato' Azahar Mohamed (Dato' Mary Lim with him) (Attorney General's
Chambers, Putrajaya) for the second defendant.
Tommy Thomas (Sitpah Selvaratnam and Megat S Merican with him)
F *(Tommy Thomas) for the plaintiff.*

Mohd Noor Ahmad (delivering judgment of the court):

- G** **[1]** The defendants, by separate applications, applied before the High Court, for certain proposed questions of law to be determined both under O14A and O 33 r 2 of the Rules of the High Court 1980 ('the RHC'). The proposed questions, as alleged, arose from the pleadings filed in Civil Suit No S3–21–99 of 2001 ('the suit'), instituted by the plaintiff against the defendants. The learned High Court judge dismissed the applications. Hence, these appeals.
- H** **[2]** The plaintiff is the Government of a component state of the Federation of Malaysia, The first defendant is a body corporate incorporated under the Companies Act 1965 and conferred with the rights, powers, privileges and liberties as spelt out in the Petroleum Development Act 1974 ('the PDA'). The second defendant is the Federal Government. By a vesting instrument of 22 March 1975 signed by the then Menteri Besar of the plaintiff ('the vesting instrument'), the first defendant was vested with the entire ownership in, and the exclusive rights, powers, liberties and privileges of exploring, exploiting, winning and obtaining petroleum whether onshore or offshore of Malaysia
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(s2 of the PDA). And under an agreement of the same date between the plaintiff and the first defendant ('the principal agreement') it was agreed that in return for the ownership and the rights, powers, liberties and privileges vested by the plaintiff in the first defendant in respect of petroleum by the vesting instrument, the first defendant was required to make to the plaintiff cash payment in the form of yearly sum amounting to the equivalent of 5% of the value of the petroleum won and saved in the State of Terengganu and sold by the first defendant, its agents or contractors. The determination and the calculation of the cash payment were elaborated and expanded in an agreement of 16 September 1987 signed between the plaintiff and the first defendant ('the supplementary agreement'). Consequently, payments were made by the first defendant to the plaintiff from 1978 until March 2000. Thereafter, the first defendant stopped the payment. The stoppage triggered the plaintiff to file the suit.

[3] Apparently, the plaintiff relies on six causes of actions against the first defendant, viz: (i) breach of contract; (ii) unfair discrimination (in deprivation of property without compensation; (iv) estoppel; (v) unlawful, directions/ultra vires; and (vi) legitimate expectation, and against the second defendant, viz: (i) ultra vires; (ii) relevant and irrelevant consideration; (iii) error of law; (iv) *Wednesbury* unreasonableness; (v) tort of inducement for breach of contract; and (vi) Government contracts. Against the first defendant, the plaintiff seeks for specific performance of the principal agreement and the supplementary agreement, an order requiring the first defendant within 14 days from the date of the court order, to pay to the plaintiff the arrears in respect of the cash payments due from 1 September 2000 and the sums due in the future in accordance with the terms of the principal agreement and the supplementary agreement, damages for breach of contract and general damages; and against the second defendant, for general damages, aggravated damages and exemplary damages, and against both the defendants, for interest on the amount to be adjudged, costs and other reliefs.

[4] The first defendant proposed the following questions of law:

- (1) did the plaintiff have any rights over petroleum won and saved in the 'continental shelf (as defined in the Continental shelf Act 1966 ('CSA') ('Continental Shelf') off the plaintiffs coast up and just' prior to:
 - (i) the enactment of the PDA?
 - (ii) the execution of the agreement dated 22 March 1975 between the plaintiff and the first defendant?
- (2) did the plaintiff vest any rights to petroleum won and saved in the Continental Shelf off the plaintiffs coast in the first defendant vide:
 - (i) the vesting instrument;
 - (ii) the agreement dated 22 March 1975 between the plaintiff and the first defendant?
- (3) is the plaintiff entitled to payment under s 4 of the PDA in respect of petroleum won and saved in the Continental Shelf off the plaintiffs coast?

- A** (4) does the doctrine of estoppel apply to Petronas?
- (5) has the plaintiff any legitimate expectation of continuing to receive payment from the first defendant in respect of petroleum won and saved in the Continental Shelf off the plaintiff's coast?.
- B** [5] And the proposed questions of law by the second defendant are:
- (1) did the plaintiff have any rights under the law over petroleum won and saved in the continental shelf (as defined under the CSA) adjacent to the plaintiff's coast up and just prior to:
- (i) the enactment of the Petroleum Development Act 1974?
- C** (ii) the execution of the agreement dated 22 March 1975 between the plaintiff and the first defendant?
- (2) if the answer to the first question is in the negative, can the plaintiff nevertheless validly vest any rights under the law in respect of petroleum won and saved in the continental shelf (as defined under the CSA) so as to enable the plaintiff to receive payment in respect of the same, vide:
- D** (i) the vesting instrument?
- (ii) the agreement dated 22 March 1975 between the plaintiff and the first defendant?
- E** (3) on a true and proper construction of the intent and. purpose of s 4 of the Petroleum Development Act 1974, is payment due to the Plaintiff in respect of petroleum won and saved in the continental shelf (as defined under the CSA) pursuant to the vesting instrument and the agreement dated 22 March 1975 entered into between the plaintiff and the first defendant.
- F** [6] Before us the learned counsel for the first defendant, Dato' Cecil Abraham contended that the disputes in the suit are mainly centred on the interpretation of the provisions of the Federal Constitution, the Trengganu State Constitution, the vesting instrument, the principal agreement and the supplementary agreement, statutes and conventions mentioned in the pleadings. As such, there is no need for the court to rely on intrinsic or oral evidence for the purpose of the interpretation. The learned senior federal counsel for the second defendant, Dato' Azahar Mohamed to a large extent adopted the submission of the learned counsel for the first defendant and added that the proposed statement of agreed facts which are based on undisputed facts derived from the plaintiff's pleadings and the applicable, legislations are sufficient to assist the court in determining the core issues,
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- H** that is to say, whether the plaintiff has any right to petroleum in the continental shelf off the coast of Terengganu between the years 1911 and 1975. It is the contention of both the learned counsel for the defendants that the proposed questions if determined one way or the other would be decisive of the matter before the court.
- I** [7] The plaintiff resisted the applications on the following grounds appearing in the affidavit of Tun Salleh Abas affirmed on 24 December 2001:

- (i) the pleadings are voluminous, lengthy and extensive (para 7); **A**
 - (ii) the causes of action relied upon by the plaintiff are exhaustive in nature (paras 8 and 9);
 - (iii) numerous issues of complexity are raised in the pleadings. Thus, each cause of action itself raises multiple issues of fact and law (para 10); **B**
 - (iv) myriad questions of law fall for determination. They include novel and difficult legal questions, some of which have never been considered by any court. Such questions cannot be answered in isolation or in a vacuum; they can only be properly determined after evidence, both documentary and viva voce, are adduced and facts emerged at the trial. Hence, it is vital for the factual matrix to evolve and develop before an attempt is made to determine legal questions (para 11); **C**
 - (v) discovery of document is fundamental to this case. A review of the pleadings will indicate that this suit involves massive documentation, including historical sources pertaining to the rights and privileges of the Terengganu Government and issues of sovereignty. Justice cannot be achieved in dealing with the documents by the shortcut method (para 12); **D**
 - (vi) having regard to the pleaded issues, it is vital that witnesses testify in the normal way in a trial and be subject to cross-examination so that the court is put in a position to make findings of fact which would then assist the court to reach conclusions on the respective cases of the three parties (para 13); **E**
 - (vii) having regard to the complex issues of fact and law, and the scale and magnitude of the cash payments, one can reasonably expect this case to go on appeal, first to the Court of Appeal and thereafter, if leave is secured, to the Federal Court. The appellate courts would be in a much better position to hear the appeals after a trial rather than a summary disposal (para 14) and **F**
 - (viii) this is a heavy commercial/constitutional case of public and national interest. It cannot be disposed off in a summary way (para 15). **G**
- [8]** The learned judge dismissed the applications on the following grounds, that: **H**
- (i) the plaintiff should be given the opportunity to call witnesses to give evidence on the factual background leading to the execution of the principal agreement and the supplementary agreement. To do otherwise would tantamount to shutting the plaintiff out from presenting its case in the best possible way it chooses (at pp 53 para D and 54 para B of the appeal record Jld 1); **I**

- A** (ii) the issues framed did not fully consider the alternative causes of action of unfair discrimination, estoppel and legitimate expectation relied upon by the plaintiff against the first defendant, and the alternative causes of action based on the principle of ultra vires, error of law, relevant and irrelevant considerations and *Wednesbury* unreasonableness relied upon by the plaintiff against the second defendant. On these issues, it is necessary for the plaintiff to adduce oral evidence in support of in order to succeed, type of injuries suffered and on the need of the decision maker to act fairly and reasonably where a person's livelihood or reputation is adversely affected by the decision) to hold that the plaintiff may need to call witnesses to support its claim that the first defendant had unfairly discriminated against the plaintiff, and also to show how far reaching the effect of the defendants' action on the plaintiff (at pp 55B–D and 56A–D of the appeal record Jld 1);
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- D** (iii) O 14A and O 33 r 2 applications should only be used in clear and simple cases. He referred to the cautionary words of Lord Wilberforce in *Allen v Gulf Oil Refinery Ltd* [1981] AC 1001 at p 1010 and to a similar sentiment expressed by our Supreme Court in *New Acres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474 at p 480 and to the strong reservation in adopting the procedure of allowing preliminary points to be taken as expressed by Lord Wilberforce in *Tilling v Whiteman* [1980] AC 1. Then, he concluded that having considered the pleadings and the submissions of the parties, he found this case is far from being plain and simple because it raised a number of complex legal issues involving, inter alia, the interpretation and construction of the Federal Constitution and the State Constitution, International Conventions, the PDA and a number of other statutes (at pp 56E–59D of the appeal record Jld 1); and
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- F**
- G** (iv) the parties thus far failed to come to an agreement on the facts relevant to the issues before the court (at p 59 para D of the appeal record Jld 1).

- H** [9] The defendants mounted their attack on the judgment of the learned judge with a total of 36 grounds (see the respective memorandum of appeal at pp 8–11 and pp 20–25 of the appeal record Jld 1). The attack is targeted not only against the four grounds based by the learned judge to dismiss their applications but also on the failures or omissions of the learned judge to consider or really consider certain matters relating to the core issues, collateral issues, the scope and the applicability of O 14A and O 33 r 2, the distinction between the principles applicable in O 14A and O 33 r 2 applications, the defences, the admissions and disputes based on the pleadings and the concession made by the defendants as deposed in the affidavits. To a great extent, the grounds overlap each other. And the four grounds on which the learned judge based his decision may be classified as
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matters relating to the need for the plaintiff to call witnesses, the non-inclusion of the plaintiffs alternative causes of action in the questions framed, the complexity of the case and the non-agreement of the parties on the relevant facts. Our focus will be on those four grounds. As a preview, a scrutiny of the judgment of the learned judge reveals that the allegations of the defendants on the aforesaid failures or omissions of the learned judge are to a certain extent real and valid.

[10] We have to consider the scope and efficacy of O 14A. The order was introduced into the RHC by PU(A) 342/2000. Its purpose is to expedite the disposal of an action at interlocutory stage in order to save costs and time. It was adopted from the English equivalent with some modifications. Our O 14A reads:

- (1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that —
 - (a) such question is suitable for determination without the full trial of the action; and
 - (b) such determination will finally determine the entire cause or matter or any claim or issue therein.
- (2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.
- (3) The court shall not determine any question under this order unless the parties have had an opportunity of being heard on the question.
- (4) The jurisdiction of the court under this order may be exercised by a registrar.
- (5) Nothing in this order shall limit the powers of the court under O 18 r 19, or any other provision of these rules.

[11] And the English O 14A of the Rules of the Supreme Court states:

- (1) The court may upon the application of a party or of its own motion determine any question of law or construction of any document arising in any cause or matter at any stage of the proceedings where it appears to the court that:
 - (a) such question is suitable for determination without a full-trial of the action, and
 - (b) such determination will finally determine (subject to any possible appeal) the entire cause or matter or any claim or issue therein.
- (2) Upon such determination the court may dismiss the cause or matter or make such order or judgment as it thinks just.
- (3) The court shall not determine any question under this order unless the parties have either:
 - (a) had an opportunity of being heard on the question, or
 - (b) consented to an order or judgment on such determination.
- (4) The jurisdiction of the court under the order may be exercised by a master.
- (5) Nothing in this order shall limit the powers of the court under O 18 r 19 or any other provision of these rules. (Emphasis added.)

A [12] In a nutshell, the order enables the court to determine any *question of law or construction of document* where it appears to the court that *such question is suitable for determination without the full trial* of the action and *such determination will finally determine the entire cause or matter or any claim or issue* therein. The order is new to our civil procedure and hence, the few local decisions of the High Court on the ambit of O 14A are not instructive. For that reason, we are inclined to refer to foreign cases decided on the equivalent of our O 14A. In *Korso Finance Establishment Anstalt v John Wedge* (unreported, February 15 1994 (CA) Transcript No 14/387), the English Court of Appeal laid down the following principles on the ambit of O 14A:

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- C** (1) An issue is 'a disputed point of fact or law relied on by way of claim or defence'.
- (2) A question of construction is well capable of constituting an issue.
- (3) If a question of construction will finally determine whether an important issue is suitable for determination under O 14A and where it is a dominant feature of the case a court ought to proceed to so determine such issue.
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- (4) Respondents to an application under O 14A are not entitled to contend they should be allowed to hunt around for evidence or something that might rum up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If these were material circumstances of which the court should take account in construing the document, they must be taken to have been known, and could only be such as were known, to the parties when the agreement was made, hi the absence of such evidence the court should not refrain from dealing with the application (see *The Supreme Court Practice* 1999 Vol 1 para 14A/2/5).
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[13] In the same case, it was held:

G In my judgment the question of construction is well capable of constituting an issue in the cause or matter. An issue may be said to be a disputed point of fact or law relied on by way of claim or defence. In the present case the determination of the question of construction one way or the other will finally determine an important issue, namely whether the respondents are primarily liable under the agreement. If the determination is in favour of the appellant it will finally determine the entire matter ...

The whole case does not have to be disposed of. It is sufficient if substantial matters can be disposed of.

H The real question in this case at the end and really crucial one it seems to me is: *will the Court be able to dispose of the case or the major part of the case or the most significant issue in the case under Order 14A dealing with the matter today.* (at p 17C of the Transcript)

I Clearly one would prefer the facts to have been simpler, *but the fact that they are complicated does not rule out the use of the Order.* (at p 7 of the Transcript)

In my judgment, having rightly decided that the issue could properly be disposed of without evidence and discovery, if he decided on the side of the plaintiffs, it

would determine the action. *In any event the question of construction was a dominant feature of the case, and the judge ought to have proceeded to determine that issue.* The postscript to his judgment, which refers to the desirability of the parties, as the judge put it, 'having their day in court', *should have been tempered by the reflection that Order 14 A has lately been provided to avoid that expense and to assist parties in the efficient disposal of their actions.* (at p 8 of the Transcript) (Emphasis added.)

[14] This position was followed by the Singapore Court of Appeal and the High Court when dealing with O 14 r 12 of the Rules of Court, our equivalent of O 14A, which recognized that resort to the procedure can be made to even where it does not dispose of the entire cause or matter (see *Payna Chettiar v Maimoon bte Ismail & Ors* [1997] 3 SLR 387; *Microsoft Corporation & Ors v Summit Holdings Ltd & Anor and other appeals* [1999] 4 SLR 529 and *Kamla Lal Hiranand v Harilela Padma Hari & Ors* [2000] 3 SLR 696). Order 14A should be read, inter alia, with O 14 (summary judgment) and O 18 r 19 (striking out pleadings and endorsements) (see *The Supreme Court Practice* 1999 Vol 1 para 14A/0/2) and O 14A r 1(5) of both our order and the English order provide that nothing in the order shall limit the powers of the court under O 18 r 19.

[15] The principles established in the cases cited are of great persuasive force as they deal with similar provision of the civil procedure. Hence, we are inclined to follow them.

[16] Order 33 r 2 of the RHC states that the court may order any question or issue arising in any cause or matter, whether of fact or law or partly of fact and partly of law, and whether raised by the pleadings or otherwise, to be tried before, at or after the trial of the cause or matter, and may give directions as to the manner in which the question or issue shall be stated. The Federal Court in *Palaniappa Chettiar v Sithabaram Chettiar & Ors* [1982] 1 MLJ 186 agreed with the learned judge in holding that it would be convenient to try the preliminary issue, as if the contention of the respondents was upheld, that could conclude the whole proceedings and it would be unnecessary to try the other issues. In *SI Rajah & Anor v Dato' Mak Ron Kam & Ors* [1993] 3 MLJ 741, Lim Beng Choon J, after considering a large number of authorities on the ambit of O 33 r 2 and its equivalent, stated that before deciding to allow the preliminary questions to be raised, the court must bear in mind the following observations:

- (a) as a general rule, the court will exercise its power under O 33 r 2 if and only if the trial of the question will result in a substantial saving of time and expenditure which otherwise would have to be expended should the action go to trial as a whole;
- (b) an order under the said rule should not be made in respect of matters which by reason of the obscurity either of the facts or the law ought to be decided at the trial of the suit;
- (c) preliminary points of law have been described as too often of so-called issues of fact, the justification is even harder to discern;
- (d) a preliminary question should be carefully and precisely framed so as to avoid difficulties of interpretation as to what is the real question which is being ordered to be tried as a preliminary issue.

- A** [17] Those are the applicable principles to an O 14A application and to the alternative application made pursuant to O 33 r 2. However, the outcome of their applications will depend very much on the facts of each case.
- B** [18] From the pleadings, we are satisfied that the core or primary issue in the suit is whether the plaintiff has, at any time, sovereign rights over petroleum in the continental shelf adjacent to the coast of Terengganu. The plaintiff contends that petroleum rights, whether onshore or offshore are part of land rights, which are vested exclusively to the plaintiff under the Federal Constitution (paras 10 and 11 of the statement of claim). This is the crux of the plaintiffs claim. The plaintiff pleads that pursuant to the PDA, the vesting instrument and the principal agreement were signed whereby the plaintiff voluntarily relinquished to the first defendant the ownership of all petroleum lying onshore or offshore of Terengganu in return for the cash payments. On the contrary, the defendants assert that the plaintiffs right over petroleum is limited to three nautical miles off the coast of Terengganu and whereas the rights over petroleum in the continental shelf remained with the second defendant and the payments made by the first defendant to the plaintiff in respect of petroleum won and saved in the continental shelf of Malaysia are to be regarded as 'wang ehsan' because the principal agreement is void and of no legal effect being ultra vires the PDA. There is no dispute that the petroleum won and saved all this while is in the continental shelf. In the reply to the defence, the plaintiff denies that its rights to petroleum is limited to three nautical miles and asserts that its sovereign rights over petroleum either onshore or offshore remained notwithstanding the agreements to join the Federation of Malaya and Malaysia, and the plaintiff vested its rights to the first defendant only upon the execution of the vesting instrument and the principal agreement.
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- F** [19] The core or primary issue is contained in the first three questions posed in the respective application. The three questions are identical though couched in different form. They are clearly defined and the plaintiff does not complain about them. The first question is whether the plaintiff has any right over petroleum in the continental shelf prior to the enactment of the PDA and the execution of the principal agreement. The second question is whether the plaintiff vested any right to petroleum won and saved in the continental shelf of the coast of Terengganu in the first defendant pursuant to the vesting instrument and the principal agreement. And, the third question is whether the plaintiff is entitled to the payment as stipulated in the principal agreement. The extra two questions posed by the first defendant are subsidiary issues and are also clearly defined. No doubt, all the questions are purely questions of law. Logically, if the answer to the first question is in the plaintiffs favour, the answers to the second and third questions should also be in the plaintiffs favour. Hence, the answers will be decisive of the main or a substantive part of the suit. Therefore, what remains to be done is the determination of liability in damages and its assessment, if any: against the defendants since each of the defendants had made a concession not to contest the plaintiffs claim should the questions be answered in the plaintiffs favour (see para 6 of Dato' Azhar bin Mohamad's affidavit in reply affirmed
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on 11 February 2002 and para 16 of Mohd Azhar bin Osman Khairuddin's affidavit in reply affirmed on the same date). However, we would like to emphasize here that our decision on these appeals will not be influenced by the concessions made. On the other hand, if the answer to the first question is against the plaintiff, the subsequent two questions will suffer the same fate and consequently, its action is doomed to fail because without the said right it had nothing to vest in the first defendant and hence, is not entitled to the payments under the principal agreement. Therefore, the determination of the threshold issue as preliminary issues will be decisive of the whole litigation or essentially the main part of the suit. Thus, resulting in a substantial saving of time and cost as it will significantly cut down the costs and time involved in pre-trial preparation or in connection with the trial proper.

[20] But the learned counsel for the plaintiff, Mr Tommy Thomas submitted that one critical or dominant issue in the suit is the reason for the payments made by the first defendant for 22 years and the subsequent refusal by the first defendant to continue payment and that issue has not been presented for a preliminary ruling. To our mind, that issue is to a certain extent covered by the third question of law posed and the legal reason for the stoppage of the payments must necessarily depend on the answers to the first and the second questions, and further, the defendants pleaded that the principle agreement under which the payments were made for 22 years is void and of no legal effect being ultra vires the PDA. Therefore, the questions of law posed are comprehensive and all embracing.

[21] The plaintiff insists on calling witnesses to testify in the normal way in a trial and be subject to cross-examination so that the court is put in a position to make findings of fact which would then assist the court to reach conclusions on the respective cases of the parties and it would also benefit the appellate court. The learned judge agreed to it only to the extent of giving the plaintiff the opportunity to call witnesses to give evidence as to the factual background leading up to the execution of the vesting instrument and the principal agreement. On this issue, we have to consider the law applicable to the interpretation and construction of statutes and documents in the light of the facts pleaded. To begin with, let us set out certain established parameters within which the issue is to be considered. As O 14A is to be read with O 18 r 19 of the RHC, it is proper to cite what was said by Sir Thomas Bingham MR in *E (a minor) v Dorset County Council; X & Ors (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at p 693 (HL) to the effect that applications of this kind are fought on the ground of a plaintiff's choosing, since he may generally be assumed to plead his best case, and there should be no risk of injustice to the plaintiffs if orders to strike out are indeed made only in plain and obvious cases. But if after argument, the court can be properly persuaded that no matter what (within the reasonable bounds of the pleadings) the actual facts the claim is bound to fail for want of cause of action, there is no reason why the parties should be required to prolong the proceedings before that decision is reached. The court is of course bound to approach each pleaded cause of action separately, and need not reach the same decision on each. One of the principles established in *Korso Finance Establishment Anstalt v John Wedge* is that the

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- A** respondents to an application under O 14A are not entitled to contend that they should be allowed to hunt around for evidence or something that might turn up on discovery which could be relied upon to explain or modify the meaning of the relevant document. If there were material circumstances of which the court should take account in construing the document, they must be taken to have known, and could only be such as were known, to the parties when the agreement was made. In the absence of such evidence, the court should not refrain from dealing with the application.
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- [22]** Having laid out the parameters, let us proceed with the law on this issue. Section 17A of the Interpretation Act 1948 and 1967 requires the court to apply the purposive approach in the interpretation of any provision of an Act. We are of the view that the relevant statutes, especially the PDA call for a purposive and literal construction which is one which follows the literal meaning of the enactment where that meaning is in accordance with the legislative purpose and applies where the literal meaning is clear and reflects the purposes of the enactment (see *Foo Loke Ying & Anor v Television-Broadcasts Ltd & Ors* [1985] 2 MLJ 35 at p 43). With regard to seeking the intention of Parliament the correct approach is to ascertain the meaning of the words employed by Parliament rather than the intention of Parliament (see *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273 at p 289).
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- E** **[23]** The learned counsel for the plaintiff contended that the plaintiff is entitled to tender oral evidence to establish many of the disputed facts, such as sovereignty, territory and territorial waters. He premised the argument on the basis that: (i) the fourteen Acts of Parliament, agreements and conventions identified by the defendants, that is to say, the source of laws and rights are inexhaustive; (ii) the conduct of the parties, their concession, the circumstances giving rise to the various Acts of Parliament and the mischief they intend to address must be examined since the policy and intent behind a statute can be reviewed but not limited in source to the *Hansard*; and (iii) an ambiguity, in particular, in the principle agreement had arisen solely by virtue of the position taken by the defendants some 25 years after its execution and some 22 years after making the payments by the stoppage. As such, that ambiguity may be resolved by looking at the background leading to its signing, and the intention of the parties, at the time of the contract, remains relevant to their choice of words. He relied on Lord Hoffman's statement in the House of Lords' case of *ICS v West Bromwich BS* [1998] 1 All ER 98 at pp 114–115 and on the provisions of ss92 proviso (f), 95, 97 and 98 of the Evidence Act 1950 ('the 1950 Act').
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- H** Amongst the evidence required by the plaintiff to fortify its case are expert evidence on the issues of sovereignty and independence, maritime regimes and oil exploration, the historic position of Terengganu, its land and seas, certain terms in the recital of the principal agreement, such as 'offshore', the representations made by the defendants as alleged including the fact of payments made giving rise to estoppel and the context in which the first defendant made such representations as a commercial and business entity, and the conduct of the defendants giving rise to a legitimate expectation, regardless of strict legal rights.
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[24] In considering this issue, we have to bear in mind that Malaysia had acceded to the Convention on the Territorial Sea and Contiguous Zone 1958 and the Convention on the Continental Shelf 1958 which were superseded by the United Nations Convention on the Laws of the Sea (1982); and subsequently the municipal laws were enacted, in particular the Continental Shelf Act 1966 and the PDA. Hence, whatever terms used in the municipal laws, such as 'continental shelf' and 'off-shore land' ('the continental shelf') must have been derived from the terms coined by the said conventions though need not necessarily be so. However, these terms have been so defined in the impugned legislations. In our view, there is no ambiguity in them. As such, there is no necessity for intrinsic evidence to be adduced. The learned counsel for the plaintiff referred to the term 'offshore' in the recital to the principal agreement. To our mind, the term 'offshore' appearing in the vesting instrument and the principal agreement is definitely a statutory term. The term appears in the long title in the PDA and in s 2(1) of the PDA. Therefore, the term is a matter for statutory interpretation, subject to established principle and doctrine. It is a cardinal rule in the interpretation of documents that the intention of the parties must be gathered from the written agreement itself. For the construction of a written agreement the established doctrine is firstly, to exclude evidence of negotiations leading up to the contract on the ground that it is only the formal agreement which records a consensus and as such evidence of negotiations is unhelpful; and secondly, to exclude evidence of the parties' subjective interpretations so that any individual purpose which either of them hopes to achieve by the agreement and their own interpretation and understanding of the agreement is not admissible.

[25] As against this, evidence of surrounding circumstances and factual background, that is to say, 'evidence of the background known to the parties at or before the date of the contract, including evidence of the "genesis" and objectively, the "aim" of the transaction', have always been admissible (see *Keng Huat Film Co Sdn Bhd v Makhanlal (Properties) Pte Ltd* [1984] 1 MLJ 243 (FC) at p 247; per Lord Wilberforce (per curiam) in *Prenn v Simmonds* [1971] 3 All ER 237 at p 241 and *Citibank NA v Ooi Boon Leong & Ors* [1981] 1 MLJ 282).

[26] It was suggested by the learned counsel for the plaintiff that as there are fourteen pieces of legislation involved, a trial is more appropriate so that in the process of interpreting the legislations, in particular the PDA, the court can review the policy and intent behind it, not so much as to see what was the policy and intent of Parliament at the time of enacting the PDA but to redefine that policy and intent. In our view, the suggestion is unwise and inapt. It is not the functions of the court to review the policy and intent of Parliament on any legislation but merely to interpret it in order to discover what the policy and intent of Parliament is and whether the same is consistent with the Federal Constitution.

[27] The core issue is: does the plaintiff have the rights to petroleum discovered offshore in the continental shelf? And another question for the court to determine is whether the plaintiff has sovereign rights. These are

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- A** purely legal questions based on the construction of documents, statutes, the Federal Constitution and the State Constitution of Terengganu, however difficult such construction may be. As such, no intrinsic evidence is to be adduced to aid their construction. In our view, the issues of sovereignty and independence of Terengganu, its historic position, its land and seas can be gathered and interpreted from amongst the aforesaid fourteen Acts of Parliament, agreements and conventions and other relevant documentary source. The issues on maritime regimes and oil-explorations are not relevant, therefore, the need for expert evidence on the issues is really unnecessary.
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- C** [28] We agree with the learned judge in holding that the plaintiff ought to be given the opportunity to adduce evidence as to the factual background leading up to the execution of the vesting instrument and the principal agreement. However, we are of the view that, having regard to the pleadings, the agreed facts and the facts to be determined by this court as agreed facts and the then existing relevant legislations and other relevant documents, it will suffice if that evidence is adduced through affidavits. However, such evidence must be restricted only to what is necessary for the purpose so that the record; will not be that bulky. We agree with the plaintiffs learned counsel's reliance on the proviso (f) of s 92, ss 95, 97 and 98 of the 1950 Act to justify the need for evidence to be adduced. We only agree on principle but as to the merits of his contention, that is to say, whether his contention holds water is to be subsequently determined by the learned trial judge. However,
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- E** we are of the opinion that, on similar basis as aforesaid, it will be adequate if that evidence is adduced through affidavits and it must be limited solely to what is essential for the purpose.

- F** [29] However, in our view, the fact that affidavit evidence is allowed to be adduced on the aforesaid restricted matters for the limited purpose should not impair our consideration on the merits of the defendants' applications. The merits of the application is a separate matter altogether from the liberty of the plaintiff to adduce affidavit evidence because affidavit evidence is permissible both under O 14A (see *The Supreme Court Practice* 1999 Vol 1 para 14A/2/8) and under O 33 r 2 of the RHC by reason that the trial of a question or issue in a cause or matter includes of fact or partly of fact as well.

- G** [30] Three years after the execution of the vesting instrument and the principal agreement the first defendant started to make the payments to the plaintiff continuously for 22 years. This is the subsequent conduct in issue. The learned counsel for the plaintiff contended that the conduct can be used to interpret the principal agreement. He relied on the decision in *Watcham v AG of East Africa Protectorate* [1919] AC 533, where it was held that for the construction of an ambiguous title to land it was proper to have regard to subsequent acting, that is to say, subsequent possession had under the title. On the contrary, the learned counsel for the defendants asserted otherwise and cited the House of Lords' cases of *James Miller & Partners Ltd v Whitworth Street Estates (Manchester) Ltd* [1970] AC 583 and *L Schuler AG v Wickman Machine Tool Sales Ltd* [1974] AC 235 and other local authorities.
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- [31] The majority of cases, in particular *Whitworth* and *L Schuler* held that subsequent actions are inadmissible to interpret a written agreement,

although they are admissible to show whether there was a contract and what the terms of the contract were, either originally or by variation, or as the basis for an estoppel (see also *Chitty on Contracts* (28th Ed, Vol 1). The decisions of the House of Lords in the two cases had been applied by our courts (see *Sri Kelangkota-Rakan Engineering JV Sdn Bhd & Ors v Arab-Malaysian Prima Realty Sdn Bhd & Ors* [2001] 1 MLJ 324 (CA) affirmed by the Federal Court; *Mewah Plus Property Sdn Bhd v Kluang District Government Servants Co-Operative Housing Society Ltd* [2000] 2 MLJ 456 (CA) and *Ata Management Consultants Sdn Bhd v Makmuran Sdn Bhd* [1997] MLJU 446). However, the decision in *Watcham* has not received general acceptance by our courts. Other than the decisions in: (i) *Lin Nyuk Chan v Wong Sz Tsin* [1964] MLJ 200; and (ii) *Guna Sittampalam & Anor v Aik Hua Properties Sdn Bhd* [1989] 2 MLJ 162, subsequent Malaysian decisions have not referred to *Watcha* but have applied *L Schuler*. It is to be noted that case (i) was decided in 1964 before *L Schuler* and *Whitworth* were decided and in case (ii) the court's attention was not drawn to *L Schuler*. The English Court of Appeal did not apply *Watcham* in *Sussex Caravan Parks Ltd v Richardson (Valuation Officer)* [1961] 1 All ER 731 where Harman LJ stated:

I only wish by way of caveat to say that *Watcham v AG of East Africa Protectorate*, to which counsel for the valuation officer called our attention, has long been under suspicion of the gravest kind from real property lawyers. (Emphasis added.)

[32] *Watcham* has been expressly disapproved by the House of Lords in *L Schuler*. Each of the lawlords in the case refused to apply *Watcham* and instead warned against reference to 'subsequent actings' in the construction of document:

... Otherwise I find no substantial support in the authorities for any general principle permitting subsequent actings of the parties to a contract to be used as throwing lights on its meaning. I would therefore reserve my opinion with regard to *Watcham's* case but repeat my view expressed in *Whitworth* with regard to the general principle. (per Lord Reid at p 252E–F).

The arguments used in order to induce us to depart from these settled rules and to admit evidence of subsequent conduct generally in aid of construction, were fragile. They were based first on the Privy Council judgment in *Watchman v Attorney-General of East African Protectorate* [1919] AC 533 not, it was pointed out, cited in *Whitworth's* case. But there was no negligence by counsel or incuria by their Lordships in omitting to refer to a precedent which I had thought had long been recognized to be nothing but the refuge of the desperate. Whether, in its own field, namely, that of interpretation of deeds relating to real property by reference to acts of possession, it retains any credibility in the face of powerful judicial criticism is not before us. But in relation to the interpretation of contracts or written documents generally, I must deprecate its future citation in English courts as authority.

In my opinion, therefore the subsequent actings relied upon should have been left entirely out of account: in saying this must not be taken to agree that the particular actings relied on are of any assistance whatever towards one or other construction of the contract. Indeed if one were to pursue the matter, the facts of the present case would be found to illustrate, rather vividly, the dangers inherent in entertaining this class of evidence at all. (per Lord Wilberforce at pp 261E–G and 262B).

- A** While I agree that this appeal should be dismissed, I would not be prepared to do so upon a consideration of the actings of the parties subsequent to the agreement as permitting me to infer their contractual intentions therefrom. I think this would be contrary to the principle of *Whitworth Street Estates (Manchester) Ltd v James Miller & Partners Ltd* [1970] AC 583. The decision in *Watchman v Attorney-General of East Africa Protectorate* (1919) AC 533 which was referred to by the learned Master of the Rolls, does not, I believe, command universal confidence (per Lord Kilbrandon at p 272E–H). (Emphasis added.)
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[33] As the decisions in *Whitworth* and *L Schuler* command popular support, we are inclined to follow them. Therefore, we conclude that the subsequent conduct is inadmissible to interpret the vesting instrument and the principal agreement; however, it is admissible to show whether there was a contract and what terms of the contract were, either originally or by variation, or as the basis for an estoppel.

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- [34]** No doubt that the issues framed did not fully consider the alternative causes of action relied on by the plaintiff against the defendants, And the learned judge held that it is necessary for the plaintiff to adduce oral evidence on the issues in support of its claim. In relation to this point, the learned counsel for the plaintiff submitted that a distinction must be drawn between circumstances where the plaintiff applies for the determination under O 14A and/or O 33 r 2 and where the defendants do so, against strenuous objection by the plaintiff. In the former, as the party bearing the burden of proof, the plaintiff chooses to discharge the burden by the procedure set out in those orders and thereby takes the risk of the limitations naturally arising from such procedure. In the latter, the plaintiff does not accept such risks and cannot be forced by the defendants to discharge the plaintiffs burden of proof through the limited process of those orders to the plaintiff's prejudice. The plaintiff having commenced a writ action (which is not obviously frivolous), is entitled to the benefit of the ordinary process of law and the right to a trial.
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- G** **[35]** With due respect, we do not agree with that submission. In our view, basically the impugned procedure is no respecter of parties but of justice. In a fit case where either of the orders applies the reluctant party has no choice but to accept the risk, and the party is no longer entitled to the benefit of the ordinary process of law and the right to a trial. There is no distinction between as to who applies for such determination and who has not, otherwise the objective and purpose of those orders will be defeated and will make a mockery of the procedure. With regard to this ground of the learned judge, with due respect we do not agree with it. Clearly, it demonstrates the lack of appreciation of the scope and efficacy of O 14A and O 33 r 2 and the distinction between them. Under the former, the entire cause or matter need not be finally determined. It also permits any claim or issue herein to be so determined, but the question must be purely question of law or construction of document. And the latter caters not only for the question or issue of law arising in a cause or matter to be tried but also of fact or partly of fact and partly of law, and also the entire cause or matter need not be finally determined. In spite of the similarities between the two orders, there are also differences between them otherwise the former would not have been
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introduced into our civil procedure. It is to be stressed that under both orders the court can direct the question or issue to be determined or tried without the need for any party having to apply for it and the court may on its own frame or reframe the question or issue for the purpose or recast the question or issue proposed by the applicant or subtract therefrom or add thereto other question or issue. These can be gathered from the provisions of the orders itself. It is manifestly evident that the court has a wide discretion on the matter. What more in this case, where the applications are pitched under both orders, the playing field within which for the learned judge to exercise his discretion is even wider. As we have said earlier, the first three questions posed by the defendants are issues of law which will determine the core or primary issue in the suit whether the plaintiff has, at any time, sovereign rights over petroleum in the continental shelf adjacent to the coast of Terengganu to be entitled to the payment under the principal agreement, the determination of which by the court will result in either of the alternatives as aforesaid in para 9(2). With that factor in mind, what ought to have been done by the learned judge, not as a matter of choice but in the exercise of discretion, is, at the outset, to scrutinize the pleadings to discover what material facts are not obviously in dispute, what facts the parties may agree after discussion and submission, with variation or otherwise and as the last resort to compel either party or both to accept the material facts, which the court thinks obviously should not be disputed. In our view, the last recourse, though drastic, is proper and permissible. We say so because under our O14A r 3 the caveat placed upon the court is merely to give the parties the opportunity of being heard on the question; but, there is a slight difference in the English civil procedure where under O 14A r 3(b) the alternative caveat placed upon the court is that the parties must consent to an order or judgment on such determination. Whatever rational behind it we are unable to comprehend. However, the learned judge did not do as what ought to have been done. He just accepted the fact that the plaintiff did not agree to the proposed statement of agreed facts (Appendix B) as distilled by the defendants from the pleadings and the applicable legislations. Having embarked on the exercise as he ought to have done, he should consider whether the undisputed or agreed facts are comprehensive and sufficient to determine and dispose off the core or primary issues. If they are comprehensive and sufficient he ought to have allowed the questions to be determined first, either with modification or otherwise, and if the undisputed facts so discovered are also sufficient not only to cover the subsidiary issues as reflected in the two extra questions posed by the first defendant but also the other causes of action of the plaintiff he should proceed to frame, either with the assistance of the parties or otherwise, other questions relevant to the issues and the causes of action and add those questions to the list for determination. Under such circumstances, there will be no necessity for further investigation of facts because: (i) only material facts, not evidence, must be pleaded and point of law raised in the pleadings (O 18 r 7(1) and r11 of the RHC); and (ii) the plaintiff being the respondent to an application under O 14A is not entitled to contend that it should be allowed to hunt around for evidence or something that may turn up on discovery which can

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- A** be relied upon to explain or modify the meaning of the relevant document (see *Korso Finance Establishment Anstalt v John Wedge*). By such exercise, there should be no risk of injustice to the plaintiff if proper determination on those questions is made because the applications are fought on the ground of the plaintiffs choosing, since it may generally be assumed to plead its best case (by analogy, re-statement of Sir Thomas Bingham MR in *E (a minor) v Dorset County Council, X & Ors (Minors) v Bedfordshire County Council*). We are fortified in our view by what was held in *Federal Insurance Co v Nakano Singapore (Pte) Ltd* [1992] 1 SLR 390 at pp 394–395 (CA):
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- C** Thirdly we are in full agreement with counsel with respect to the powers of the court under O 33 r 2 of the RSC. That rule expressly provides that the court may order any question or issue arising in a cause or matter, whether of fact or law or partly of fact and partly of law to be tried before at or after the trial of the cause or matter. *It would be contrary to the express terms of that rule for a court to hold that it has no power to state a preliminary point even if it involves having to determine some issues of fact in order to determine the point of law.* An action may involve many disputes on the facts as well as on the law, *some more complex than others. It may be that the determination of a preliminary point in one way may make it unnecessary for other more complex issues of fact or law to be decided, thus resulting in a saving of time and expense of a protracted trial on those issues.* (Emphasis added.)
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[36] And by what Jessel MR said in *Pooley v Driver* (1877) 5 ChD 458 at p 460:

- E** ... the court will, at the trial of an action involving questions both of law and of fact, *decide the question of law first*, if it shall appear that the decision of such question may render it unnecessary to try the question of fact. (Emphasis added.)

- [37]** And further, in *SC Tavener & Co Ltd v Glamorgan County Council* (1941) 57 TLR 243, the court held that it is insufficient to sustain an objection for the respondent to the application to state that he proposes to adduce evidence on a variety of matters at the trial and the court has the discretion to determine the preliminary issues/questions on materials that appear in the pleadings or from any document referred to in the pleadings which are capable of further clarification by any evidence which could be given at the trial of the action itself. That is on the assumption that the facts so discovered are comprehensive and sufficient. However, if they are otherwise, the learned judge should consider whether on the available undisputed facts he will be in a position to determine the core or primary issue and/or some or all of the subsidiary issues and causes of action. If he is in a position to do so, he should then frame additional questions or drop or recast the questions framed as he thinks fit and proceed to determine the issues and causes of action. However, if he is not in a position to do so, he should then consider whether any question or issue of fact or partly of fact and partly of law should be tried first, although this process may result in split trials which is permissible either O 14A or O 33 r 2. We are fortified by what was stated by Chong Siew Fai J (as he then was) in *Huang Ee Hoe & Ors v Tiong Thai King & Ors* [1991] 2 MLJ 51 at para 4 to the effect that where the preliminary issues that arose in the application were disposed of in advance, preparatory works for the trial may not be necessary depending upon the result of the application. An early disposal of the present
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application would place the parties in a clearer position as to whether anything farther needs or ought to be done in the conduct of the case. It was further held that the trial of the preliminary issues/questions would further clarify the complex issues that face the court in determining this suit. However, it is within his discretion whether or not to adopt that course and if he thinks that the process is cumbersome and does not serve the objective and purpose of the orders, then only he is entitled to dismiss the applications. That is, in our view, the proper or judicious exercise of discretion required.

[38] The merits and demerits of the plaintiffs causes of action were argued at great length by both parties. We decline to consider whether they can be sustained and maintained in the suit because that will be the function and task of another forum. However, we will touch on them when we scrutinize and marshal the facts in relation to the questions posed.

[39] On the so-called complexity of the case, in our view, the learned judge was correct in referring to the cautionary words of Lord Wilberforce in *Allen v Gulf Oil Refining Ltd*, to the similar sentiment expressed in *Newacres Sdn Bhd v Sri Alam Sdn Bhd* [1991] 3 MLJ 474, and to the strong reservation in adopting the procedure of allowing preliminary points to be taken as expressed by Lord Wilberforce in *Tilling v Whiteman*. There is no doubt that he was steadfast to the beacon. However, with due respect, we do not agree with the manner in which he arrived at his conclusions and findings that this case is far from being plain and simple because it raises a number of complex legal issues involving, inter alia, the interpretation and construction of the constitutions, conventions, the PDA and other statutes. He arrived at such conclusion and findings upon mere consideration of the pleadings and the submissions of the parties without identifying and making proper appraisal of the material facts pleaded which are obviously undisputed or which should not have been disputed including admissions. Had he done so he would have been able to really appreciate the facts and the magnitude of the case better and thereafter, would have arrived at an appropriate conclusion and findings. In short, his consideration on the matter is inadequate, incomplete and unsustainable. Hence, in our view, such exercise of discretion is incorrect.

[40] The learned counsel for the plaintiff cited the cases of *Tilling v Whiteman*; *Newacres Sdn Bhd v Sri Alam Sdn Bhd* and *Allen v Gulf Oil Refining Ltd* as precedent in support of his argument on the complexity of the case. Precedent is a valuable stabilizing influence in our legal system. But, comparing the facts and outcome of cases in this branch of the law is a sterile exercise and is a misuse of the only proper use of precedent, viz, to identify the relevant rule and to apply it to the facts as found (see *Jolley v Sutton London Borough Council* [2000] 1 WLR 1082 at p 1089E). The decisions in the cases cited are based on their own peculiar facts. In *Tilling v Whiteman*, the matter went up to the House of Lords on hypothetical facts. This is not the case before us. In *Newacres Sdn Bhd v Sri Alam Sdn Bhd*, the issue before the court was an instance of breach of fiduciary duty which required proof by extrinsic evidence (at p 478D). And in *Allen v Gulf Oil Refining Ltd*, the court held that the question framed was 'useless' because it does nothing to resolve the issues in the action (at p 163G).

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- A** [41] In our view, even if the case appears to be or is complicated it does not mean that the court must shun away from considering the applicability of O 14A and O 33 r 2 in relation to the questions of law posed which are clear and definite and the issues are clearcut. Real and serious attempt must be made to identify the material facts pleaded which are obviously undisputed or which should not have been disputed and then to apply the relevant rule to the facts as found. There are authorities in support of the proposition that merely because an issue of law takes a little longer to determine does not mean that the court should refuse the application (see *Korso Finance Establishment Anstalt v John Wedge*). In *Ringtower Holding Plc, Re* (1989) BCC 82 at p 84, it was held that if the applicants can satisfy the court that the petitioner's claims are manifestly unsustainable or are an abuse of the process, justice requires that the petition (even one running to 28pp) be struck out forthwith. This case was followed in *Tuan Haji Ishak bin Ismail & Ors v Leong Hup Holdings Bhd and other appeals* [1996] 1 MLJ 661 where it was held at pp 661–662:
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- D** What may be 'plain and obvious' to a specialist in company law may not be so to another who does not have this specialized knowledge. The standard is an objective one and implies that the perception required is that of a person who has the required expertise. *The court may strike out a claim even though it required a long and elaborate hearing before the court was satisfied that there was no cause of action ...* . (Emphasis added.)
- E** [42] In *Bank Negara Malaysia v Mohd Ismail* [1992] 1 MJL 400 at p 401, it was held:
- Where the issue raised is solely a question of law without reference to any fact or where the facts are clear and undisputed, the court should exercise its duty under O 14. If the legal point is understood and the court is satisfied it is unarguable, the court is not prevented from granting a summary judgment merely because 'the question of law is at first blush of some complexity and therefore takes a little longer to understand. (Emphasis added.)
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- [43] In *Cow v Casey* [1949] 1 KB 474 at p 481, it was held:
- The only point is, that, as everybody knows, the Rent Restriction Acts are complicated Acts. They contain a number of difficult matters and there are a number of authorities decided upon them. But it is not sufficient under an O 14 case to flourish the title of the Increase of Rent restriction Acts in the face of the court and say that is enough to give leave to defend. If a point taken under the Rent Restriction Acts is quite obviously an unarguable point, the court has precisely the same duty under O 14 as it has in any other case. *It may take a little longer to understand the point and to be quite sure that one has seen all round it in a case under the Rent Restriction Acts than in other cases, but when the point is understood and the court is satisfied that it is really unarguable, the court has the duty to apply the rule, and, in my opinion, the master was perfectly right, the judge was perfectly, right, and the appeal should be dismissed.* (Emphasis added.)
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- I** [44] Although the aforesaid cases are concerned with O 18, r 19 and O 14, nevertheless they are relevant because O 14A should be read with those orders.
- [45] Legally, in O 14A and O 33 r 2 of the RHC applications no party has any liberty to disagree just for the sake of disagreeing to any fact pleaded

which is obviously undisputed because for the court to give indulgence to such disagreement will not only erode the efficacy but also will stultify the objective and purpose of those orders. On that basis, we scrutinized the pleadings and the proposed statement of agreed facts (see Appendix 11), then we called upon the parties to submit on the proposed statement of agreed facts wherein certain facts, which were not agreed to previously, had been agreed to by the defendants, and finally, having considered the respective submission on the matter we decided to impose upon the parties to accept the facts which, in our considered view, having regard to the other related facts which are obviously undisputed or facts which had been agreed to by the defendants, should have been agreed to by the parties, with or without variation or reservation. Out of that exercise, we now produce three appendices, which shall be an integral part of this, judgment, namely:

Appendix A — pleaded facts which are obviously undisputed.

Appendix B — pleaded facts which were subsequently agreed to by the defendants after submissions.

Appendix C — pleaded facts which are imposed on the parties as undisputed, with or without variation or reservation.

[46] And, having scrutinized and marshalled those facts, we frame an additional question of law to cover the alleged causes of action on which the plaintiff relies to substantiate its claim, as per Appendix D.

[47] Notwithstanding those facts as enumerated in Appendices A, B and C, the parties may, at any stage of the hearing of the applications, apply to the court for elaboration and/or inclusion of other agreed facts related to facts already pleaded or other pleaded facts which may arise out of the subsequent amendments of the pleadings, if any. In respect of Appendix C, in relation to the notes stated therein, we are desirous that the defendants will not hesitate in agreeing to the pleaded facts which may be factually true, so that affidavit evidence will not be necessary for the trial of the issue of fact or partly of fact and partly of law under O 33 r 2. We make this concession in order to ensure that justice is done to the case. However, that liberty is to be subject to the constraints and limitations as dictated in this judgment relating to the matters that may be proved by affidavit evidence except that in the case of pleaded facts which are not sufficient for the purpose of determining the additional question of law (per Appendix D) affidavit evidence may be used by the parties. However, the decision whether to allow such application, if any, and to what extent it should be allowed and the nature and extend of the affidavit evidence to be used for the limited purposes as aforesaid, is left entirely to the learned judge's discretion.

[48] It is trite law that the function of an appellate court is one of review only. However, where the discretion has not been exercised judicially, that is to say, when the judge *has committed an error of law* or misconceived the facts or *has not given sufficient weight to the relevant considerations* or *the decision would result in injustice*, the court can interfere (see *Vijayalakshmi Devi d/o Nadchatiram v Dr Mahadevan s/o Nadchatiram & Ors* [1995] 2 MLJ 709

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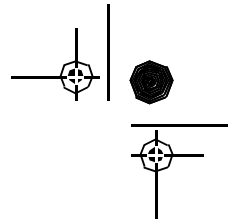
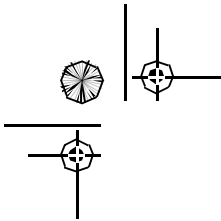
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- A** (FC); *Tien Ik Sdn Bhd & Ors v Kuok Khoon Hwong Peter* [1992] 2 MLJ 689 (SC); *Hadmor Productions Ltd v Hamilton* [1983] 1 AC 191; *Evans v Bartlam* [1937] AC 473 (SC); *New Zealand Insurance Co Ltd v Ong Choon Lin t/a Syarikat Federal Motor Trading* [1992] 1 MLJ 185 (SC) and *Egerton v Jones* [1939] 2 KB 702). On the final analysis of the judgment of the learned judge, we are satisfied that on the aforesaid reasons, with due respect, the learned judge had not acted in consonance with well-established principles on the matter in considering the defendants' applications. Hence, we hereby interfere with the exercise of his discretion.
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- [49]** Therefore, the appeals are hereby allowed with costs here and below. The deposits, if any, are to be refunded. The case is remitted to the High Court for an early hearing.
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Appeals allowed with costs.

Reported by Lim Lee Na

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